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IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *PETITIONER*

v.

CHARLOTTE CUNO, ET AL., *RESPONDENTS*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONER

JEROME B. LIBIN
Counsel of Record
KENT L. JONES
KENDALL L. HOUGHTON
JEFFREY A. FRIEDMAN
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the investment tax credit provided by Ohio law against the State's corporate franchise tax violates the Commerce Clause of the Constitution, U.S. Const. Art I, § 8, cl.3.

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company ("Ford") is a publicly-held corporation. Ford has no parent corporation, and there is no publicly-held corporation that owns 10% or more of Ford's stock.

General Motors Corporation ("GM") is a publicly-held corporation. GM has no parent corporation, and there is no publicly-held corporation that owns 10% or more of GM's stock.

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BRIEF OF *AMICI CURIAE* FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION IN SUPPORT OF PETITIONER

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of Ford Motor Company and General Motors Corporation as *amici curiae* in support of petitioner.[1]

INTEREST OF *AMICI CURIAE*

The *amici curiae* are United States corporations engaged in capital intensive business activities. These activities include, in particular, the manufacture and sale of automobiles and

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[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

trucks in the United States and in worldwide markets. In the course of these commercial activities, the *amici* make significant capital investments within the United States in States such as Michigan and Ohio and also make large investments in foreign locations. In planning these capital investments, the *amici* necessarily consider commercial factors such as the availability of skilled labor and the relative costs of constructing and operating facilities in different locations. The local tax structures and local tax rates that apply to manufacturing operations are among the many significant cost factors that are considered in selecting the location for such facilities.

The *amici* operate manufacturing facilities in several States that possess similar or identical investment tax credit provisions to those addressed in this case. For example, *amicus* Ford Motor Company currently employs more than 14,000 people in the State of Ohio, more than 66,000 people in the State of Michigan, and has made more than $11 billion of capital expenditures in these States over the last five years. In addition, during the last five years, Ford has made over $4 billion of capital expenditures in other States that have similar or identical tax credit provisions.

Amicus General Motors Corporation currently employs more than 20,000 people in Ohio, more than 75,000 people in Michigan, and has made over $12 billion of capital expenditures in these States in the last five years. Throughout the remainder of the Nation, in other States that have tax credit provisions similar to those at issue in this case, General Motors has invested more than $3 billion in the construction or expansion of manufacturing facilities within the last five years.

In the current conditions of the world economy, the ability of state and local governments to provide tax credits to

facilitate the location and expansion of manufacturing activity within their borders is a matter of great importance. The availability of such tax credits allows the States to provide a more level playing field for American manufacturers competing in worldwide markets. The availability of these credits also thereby assists employers such as the *amici* in their efforts to provide employment opportunities, and the economic benefits of employment, within those locations.

Because the decision of the court of appeals in this case has obvious broad importance to their business operations, the *amici* submit this brief in support of the petition for a writ of certiorari.

ARGUMENT

The question here presented has substantial and continuing importance to businesses and to state and local governments. It calls into question the integrity of the tax incentives and economic assumptions that underlie business location decisions within the United States and across our borders as well.

The decision of the court of appeals invalidating Ohio's investment tax credit discounts the purpose for the credit, disregards fundamental principles enunciated by this Court, misapplies the precedents of this Court, and is at odds with a decision of the highest court of a State in the same Circuit. If left undisturbed, the decision below will have far-reaching effects not only in the Sixth Circuit but throughout the entire Nation.

Because of the importance of the question presented and the need for prompt resolution of the conflict created by the decision below, the petition for a writ of certiorari should be granted.

1. The rationale and need for state and local investment tax credits.

An investment tax credit is one particular form of tax incentive offered by state and local governments in furtherance of their own tax policies. The credit typically provides a one-time reduction in state income taxes for new investments in manufacturing equipment and machinery. It is generally available for all investments in manufacturing assets located in the tax-credit jurisdiction and is available regardless of the interstate or intrastate character of the taxpayer's business.

In one form or another, an investment tax credit has been enacted by virtually every State. See Pet. 2, 7-9. In Ohio, for the years here at issue, the investment tax credit is generally calculated as 7.5 percent of the amount by which the taxpayer's investment in manufacturing equipment and machinery during the tax year exceeds the amount of such investment over the prior three years. Ohio Rev. Code § 5733.33. The credit could increase to 13.5 percent and also be subject to a $1 million cap under certain circumstances

The investment tax credit serves several important economic functions. Viewed from the perspective of the State, the primary goal of the tax credit is, of course, to enhance the overall economic infrastructure of the State by providing an incentive for business investments that will lead to new employment opportunities and, as a result, new sources of income for citizens. The investment tax credit also leads to expanded tax revenues for the State itself, both (i) from the increased taxes on the new income earned by individuals from the new employment opportunities created by the new investment and also (ii) through increased sales, payroll, property and income taxes on the additional business activities generated through the new investment.

The investment tax credit also plays an important role for businesses. In planning and implementing rational business investments in what have become worldwide markets, companies such as the *amici* necessarily consider all relevant cost factors, including local tax structures and rates. The availability of a tax credit in a particular State or from a particular local government can be of substantial importance in determining the best economic environment in which to conduct business. The availability of these tax credits allows the States to create a more level playing field for domestic manufacturing activity competing in worldwide markets, and thereby assists the efforts of businesses to utilize the available domestic pools of skilled labor in world commerce.

2. The decision of the court of appeals disregards fundamental principles enunciated by this Court.

In *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977), this Court set forth certain fundamental principles that establish the framework within which a State may shape its policy toward business taxation.

> Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

429 U.S. at 336-337. In other words, a State is free to use its tax system to encourage the growth of local business as well

as to compete for a share of interstate business, provided that in doing so, it does not impose an inappropriate tax burden on out-of-state business activity. The imposition of such a burden may cause the State's taxing scheme to run afoul of the Commerce Clause.

Consistent with the framework established in *Boston Stock Exchange*, it is clear that a State may utilize low tax rates to attract new business investment. *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 199 n.15 (1994) ("In addition, it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes."). A tax credit or exemption of the type here involved is merely a subset of an across-the-board low-tax regime. It is one of the classic tax incentives that a State may offer to attract new business investment. The credit provides a one-time reduction in the effective tax rate for those who qualify for its benefit. And it does so without imposing any tax burden whatsoever on those who choose not to qualify.

The court of appeals initially recognized the fundamental principles set forth in *Boston Stock Exchange*. Pet. App. 4a-5a. It also acknowledged that the Ohio investment tax credit was "equally available to in-state and out-of-state businesses." Pet. App. 6a. It then proceeded to hold the tax credit unconstitutional.

The court of appeals was apparently influenced by respondents' contention that the credit somehow discriminated by "coercing" in-state taxpayers to make investments in machinery and equipment in Ohio at the expense of development in other States (Pet. App. 6a), and that the result was to "hinder free trade among the states." *Id.* at 9a. In addition, the court of appeals apparently believed that, because the Ohio tax incentive provides a benefit to

those who make the requisite investment in order to take advantage of the credit, it must somehow impose a corresponding burden on those who choose not to take advantage of it. *Id.* at 9a-10a.

The court's "benefit-burden" dichotomy was based on this Court's statement in *Bacchus Imports* v. *Dias*, 468 U.S. 263, 273 (1984), to the effect that "[v]irtually every discriminatory statute allocates benefits and burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relevant sense." The threshold question presented in this case, however, is whether the Ohio tax credit provision *is* a "discriminatory statute" in the first instance.

What the court below apparently considered to be a legally impermissible tax burden is in fact nothing more than an "opportunity cost" that would inevitably be incurred by any taxpayer who chooses to forego Ohio's tax credit by investing elsewhere. An opportunity cost is something incurred as a matter of business judgment. It is not the equivalent of a tax cost or "detriment" imposed by a state statute. No case decided by this Court has held that a tax incentive of the type here involved violates the Commerce Clause simply because the taxpayers who choose not to take advantage of it will incur an opportunity cost as a result.

Ohio's investment tax credit is designed in the precise manner contemplated by this Court in *Boston Stock Exchange*. Its purpose is to encourage the growth of intrastate business and to compete for a share of interstate and worldwide business. The credit is constitutionally permissible because it performs its function without imposing a tax burden of any kind on "products manufactured or the business operations performed in any other State." *Boston Stock Exchange*, 429 U.S. at 337.

3. The decision of the court of appeals misapplies the precedents of this Court.

The Ohio investment tax credit does not distinguish in its application between in-state and out-of-state business, between in-state and out-of-state products, or between interstate and intrastate commerce. It is available as an inducement for any additional business activity involving machinery and equipment, and it is available on precisely equal terms to intrastate and interstate commercial activities. It therefore does not violate the Commerce Clause restrictions on state taxation that are established in the decisions of this Court.

Stated another way, credits and exemptions of the type here involved do not impose the type of burden on interstate commerce that this Court has found offensive. By contrast, in all of the cases on which the court of appeals focused, the local taxing scheme imposed a direct tax burden on taxpayers who chose to engage in particular business activity partly within and partly without the taxing State, rather than carry on all such activity locally.

Thus, in *Boston Stock Exchange*, persons selling stock that would be transferred through a New York transfer agent paid a lower transfer tax if they sold their shares on a New York exchange than if the sale took place on an out-of-state exchange. The higher tax imposed by New York on out-of-state sales constituted "both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States." 429 U.S. at 331.

In *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388 (1984), exporters shipping products out of New York received a tax credit for their shipments that was not commensurate with their New York exports, but instead

varied in amount based on the proportion of New York exports to total exports. The fact that the credit offered by New York was reduced when out-of-state exports were proportionately greater than in-state exports resulted in impermissible discrimination against interstate commerce.

Finally, in *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), Louisiana imposed a first-use tax on natural gas imported from the Outer Continental Shelf. The tax was imposed on the first local use but was borne by the ultimate consumer. As a result of numerous exemptions and credits offered for particular local uses, the tax was actually borne only by out-of-state consumers. The Louisiana scheme was struck down as constituting impermissible discrimination against interstate commerce.[2]

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[2] The Louisiana scheme also allowed a credit against the local severance tax for any first-use tax paid. This Court stated that the "obvious economic effect" of the credit was to encourage offshore gas producers to invest in further production in Louisiana rather than offshore or in other States. 451 U.S. at 757. The court of appeals highlighted this aspect of the case in its decision below. See Pet. App. 8a.

Because this Court considered the validity of the first-use tax scheme as a whole and did not address the validity of the severance tax credit in a vacuum, *Maryland* v. *Louisiana* cannot be read as addressing the constitutionality of a tax incentive of the type here involved. In fact, the discussion of the severance tax credit was in no way central to this Court's holding, which emphasized the discrimination with respect to ultimate users of the natural gas produced. Moreover, in isolation, this Court's comments regarding the severance tax credit seem questionable. While the credit encouraged offshore producers to invest in Louisiana, it also, by definition, encouraged local Louisiana producers to invest offshore. Only producers engaged in production in both locations could obtain the benefit of the credit. As a result, the credit did not

All three of the foregoing cases involved, in one form or another, what the court below referred to as "location incentives." Pet. App. 10a. In each case, the State's taxing scheme benefited particular business activity conducted locally and imposed a direct tax burden on taxpayers who chose to engage in a portion of such activity out-of-state. In all three instances, this Court found the taxing scheme to be unconstitutionally discriminatory.

Under Ohio's tax incentive regime, a taxpayer, whether in-state or out-of-state, either takes advantage of the investment tax credit or it does not. While the credit is designed to encourage local investment in machinery and equipment, no adverse tax consequences are imposed by Ohio if the taxpayer foregoes the opportunity and invests in another State. In other words, in contrast to the taxing schemes that governed the out-of-state stock sales in *Boston Stock Exchange*, the out-of-state exports in *Westinghouse*, and the out-of-state sales of natural gas in *Maryland* v. *Louisiana*, the Ohio taxing scheme does not impose a direct tax burden on taxpayers who choose to disregard Ohio's location incentive and make their investments elsewhere.

In purporting to address the "economic effect" of the Ohio tax incentive (Pet. App. 10a), the court below incorrectly isolated its analysis solely on the tax credit itself and erroneously failed to consider the overall effect of Ohio's taxing scheme. In particular, the court took no account of the fact that a new investment in machinery and equipment in Ohio would definitely increase both the numerator and the denominator of the property factor in Ohio's three-factor apportionment formula and would also quite likely increase

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discriminate against interstate commerce in favor of local interests, as this Court appears to have implied.

the sales and payroll factors as well, thereby increasing the overall apportionment of income to Ohio. Depending on circumstances, a taxpayer taking advantage of the investment tax credit thus could end up paying *more* tax to Ohio than if it had made its new investment elsewhere.

This Court has never held a state tax incentive to be unconstitutionally discriminatory where, as here, the incentive actually has the potential for increasing state taxes and the only adverse consequence of not taking advantage of it is the opportunity cost that would be incurred. Yet, that is precisely the holding of the court of appeals in the instant case.

4. The reasoning of the court of appeals is at odds with the reasoning and decision of the highest court of a State in the same federal circuit.

The reasoning applied by the court of appeals in this case is also at odds with the reasoning and decision of the Michigan Supreme Court in *Caterpillar, Inc. v. Department of Treasury*, 488 N.W.2d 182 (Mich. 1992), and the Michigan Court of Appeals in *Jefferson Smurfit Corp. v. Department of Treasury*, 639 N.W.2d 269 (2001). (Michigan is, of course, a Sixth Circuit State.)

In the *Caterpillar* case, the Michigan Supreme Court upheld the "capital acquisition deduction" that the State provided for the cost of new capital assets placed in service during the year in calculating the State's value-added tax. That deduction – like the Ohio tax credit provision involved in this case – was available only for new investments in "assets [that] are physically located in" the taxing State. 488 N.W.2d at 187. And, the Michigan deduction – like the Ohio credit – "is available for any taxpayer, whether a multistate company or a company whose business activity is * * * entirely" in the taxing State. *Ibid.*; *see* 488 N.W.2d at 186.

The Michigan Supreme Court held in the *Caterpillar* case that such tax incentive provisions do not discriminate on their face, for they are "available for any taxpayer" and apply equally to interstate and intrastate commercial activities. 488 N.W. 2d at 192. The court further noted that there was no evidence of a "discriminatory purpose" in such tax incentives, for it is well recognized that it is "a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state." *Ibid.* (quoting *Boston Stock Exchange*, 429 U.S. at 336-337). (In *Jefferson Smurfit*, the Michigan Court of Appeals relied heavily on the reasoning of the Michigan Supreme Court in *Caterpillar*.)

The Michigan Supreme Court decision in the *Caterpillar* case is notable for the careful and detailed consideration that the court gave to the constitutional precedents from this Court. By contrast, the decision of the Sixth Circuit in this case provides only a cursory analysis of a selected few of this Court's decisions.[3]

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[3] Respondents Cuno et al. have filed a separate petition for a writ of certiorari in this case (No. 04-1407) that challenges the portion of the decision below (Pet. App. 11a-14a) that held that the Ohio property tax exemption for certain types of qualified new investments does *not* violate the Commerce Clause. DaimlerChrysler, the petitioner in this case (No. 04-1704), filed a brief in opposition to the Cuno petition (No. 04-1407), arguing that the decision of the court of appeals upholding the property tax exemption is both correct and uncontroversial because it simply permits an exemption from state and local property taxes that would not in any event be paid if the property were *not* located within the State. Since the Ohio property tax exemption treats all property – wherever located and whether employed in interstate or intrastate commerce – exactly the same, the suggestion that the exemption somehow discriminates against interstate commerce seems quite insubstantial and therefore does not warrant review by

5. Prompt resolution of this conflict is a matter of high importance.

Because the decision below significantly departs from this Court's decisions and threatens to invalidate tax laws in essentially every State, this case plainly presents a matter of substantial recurring importance that warrants review by this Court. In light of the clear importance of the decision below, respondents have expressly acquiesced in the grant of this petition for a writ of certiorari.

It nonetheless remains appropriate to emphasize that the mere existence of the decision below creates enormous planning uncertainties for business investment throughout the United States. The uncertainties created by the decision below have obstructed the ability of taxpayers to proceed with ordinary commercial investment and development decisions. Until these uncertainties are resolved by this Court's review of the decision below, taxpayers cannot logically determine the extent to which state taxes will apply to their business operations and therefore cannot logically determine where or, indeed, whether new investments should be located in any State within the United States.

The world market in which our economy operates will not sit patiently by, awaiting further developments in this Nation's constitutional jurisprudence. The decision below has created uncertainties that seriously impede investment

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this Court. In particular, the few cases on which Cuno et al. seek to rely in support of their petition were all correctly explained and correctly distinguished in the decision of the court of appeals (Pet. App. 11a-14a) and also in the brief in opposition filed by DaimlerChrysler (Br. in Opp. No. 04-1407, at 8-9). For these reasons, the *amici* join in recommending that the Cuno et al. petition be denied.

decisions to locate new business operations within the various States, and the resulting delay and confusion is unavoidably harmful to the growth and development of our Nation's commerce as a whole. For all of these reasons, review by this Court of the decision below is warranted.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JEROME B. LIBIN
Counsel of Record
KENT L. JONES
KENDALL L. HOUGHTON
JEFFREY A. FRIEDMAN
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 383-0100

Counsel for Amici Curiae

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